No. 98-1306

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin; GEORGE E. MEYER, Secretary, Wisconsin Department of Natural Resources; JAMES T. ADDIS, Administrator, DNR Division of Resource Management; JOHN E. FRYATT, Administrator, DNR Division of Enforcement; HERBERT F. BEHNKE, TRYGBE A. SOLBERG, NEAL W. SCHNEIDER, BETTY JO NELSEN, MARY JANE NELSON, JAMES E. TIEFENTHALER, JR., and STEPHEN D. WILLETT, Members, Wisconsin Natural Resources Board,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

Pursuant to SUP. CT. R. 15.6, the Menominee Indian Tribe of Wisconsin ("the Tribe") respectfully submits this memorandum in reply to the *Brief in Opposition* (Mar. 17, 1999) ("Opp. Brief") filed by certain State officials ("the State"). The Tribe will address only the Court's recent ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 525 U.S. ___, No. 97-1337 (Mar. 24, 1999), and certain procedural issues raised in the State's Opp. Brief.

II. ARGUMENT

A. THE *MILLE LACS* DECISION CONTROLS THIS CASE.

No decision of this Court more starkly illuminates the error in the approach of the courts below in this case than the recent decision in *Mille Lacs*. This decision reiterates and clarifies that Indian treaties can only be interpreted in light of their history and negotiations, and must be interpreted according to the Indian understanding of them. This, in turn, requires the development of a full factual record – the opportunity for which was denied the Tribe by the lower courts in this case.

The *Mille Lacs* decision was based upon such a record. The Court's opinion began with a lengthy recitation of facts based upon the expert reports and extensive documentary evidence developed at trial. Slip op. at 1-11. In fact, the Court repeatedly cites the reports of two experts who also filed reports on behalf of the Tribe's

claims in this case: Dr. Bruce M. White, *id.* at 3, 4, 5, 6, 20; and Prof. Charles E. Cleland, *id.* at 3, 4, 19, 20.[1]

The most relevant portion of the opinion for present purposes, however, is Section III, *id.* at 21-29, which not only deals with treaty language substantially similar to that of the 1848 Treaty involved in this case, App. 199, but also rejects the approach taken by the lower courts in this case *and* their interpretation of *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985). The treaty language at issue in Section III is a provision of an 1855 treaty with the Chippewa under which the Indians "fully and entirely relinquish and convey . . . any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in and to" any remaining lands. Treaty of Feb. 22, 1855, art. I, 10 Stat. 1165. The issue was whether this language, remarkably similar to that in the 1848 Treaty in this case,[2] extinguished previously reserved usufructuary rights.

The Court began its analysis by noting that the 1855 treaty language mentions neither the prior treaty nor usufructuary rights. *Mille Lacs*, slip op. at 22. The same may be said for the 1848 Treaty in this case. The Court then addressed the State's contention that the language

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[1] Two of the Tribe's other four experts in this case, Dr. James McClurken and Prof. Thomas Lund, also wrote reports and testified for the tribes in *Mille Lacs*.

[2] "The said Menomonee tribe of Indians agree to cede, and do hereby cede, sell, and relinquish . . . all their lands in the State of Wisconsin wherever situated." App. 199, art. II. Usufructuary rights were previously reserved in these lands in the 1831 treaty. App. 171, ¶ Sixth.

quoted above abrogated the previously reserved rights. In doing so, the Court set the process for interpreting Indian treaties:

> [T]o determine whether this language abrogates Chippewa Treaty rights, *we look beyond the written words to the larger context that frames the Treaty,* including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.' . . . In this case, an examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful . . . because *we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.*

Id. at 22-23 (citations omitted) (emphasis added).

The Court proceeds to make it very clear that the treaty language cannot be interpreted in isolation, and that treaty ambiguity need not be intrinsic; that is, contained in the words themselves. Quite the contrary: only after the historical record has been examined can the treaty be interpreted.

> At the very least, the historical record refutes the State's assertion that the 1855 Treaty 'unambiguously' abrogated the . . . rights. Given this plausible ambiguity, we cannot agree with the State. . . . We have held that Indian treaties are to be interpreted liberally in favor of the Indians, . . . and that any ambiguities are to be resolved in their favor . . . .

Id. at 26-27 (citations omitted). This approach is exactly that urged by the Tribe in this case and rejected by the lower courts at the State's urging.

Furthermore, the Court in *Mille Lacs* rejected the approach to *Klamath* which was advanced by the State and adopted by the lower courts in this case. In so doing, the Court reiterated that Indian treaty cases cannot be decided upon the language of the treaty alone, but only upon a full historical record:

> [T]he State's argument that similar language in the two Treaties involving different parties has precisely the same meaning *reveals a fundamental misunderstanding of basic principles of treaty construction.* Our holding in Klamath was not based solely *on the bare language.* . . . Rather, to reach our conclusion about the meaning of the language, we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words. *This review of the history and the negotiations of the agreements is central to our interpretation of treaties.*

Mille Lacs, slip op. at 28-29 (citations omitted) (italicized emphasis added) (underlined emphasis in original).

The lower courts in this case, at the prompting of the State, ignored these fundamental precepts of Indian law – indeed, of treaty interpretation generally[3] – by seizing upon bare treaty language alone along with a few selected documents, while ignoring altogether the six expert reports and the hundreds of documents supporting them that had been filed with the district court. There can be no doubt after *Mille Lacs* that Indian treaties *must* be interpreted based upon a full understanding of the

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[3] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. ___, slip op., at 9 (1999).

history and surrounding circumstances, and particularly in light of the Indian understanding of the treaties.[4] This cannot be done upon a motion for judgment on the pleadings at the threshold of the case. It requires a full record, developed at trial or perhaps upon summary judgment after discovery. To date, every case but this one has done so. By short-circuiting this process, the lower courts ignored the fundamental rules and denied the Tribe their day in court.

B. THE STATE GLOSSES OVER THE PROCEDURAL DEFECTS IN THE DISTRICT COURT'S DISMISSAL OF THE TRIBE'S COMPLAINT.

The State attempts to simplify and rationalize the procedural issues in this case. Opp. Brief at 3-5. In the process, the State has distorted what actually occurred. Along with the district court's failure to follow the long-standing canons of treaty construction by dismissing this case on a threshold motion without the benefit of a record, the district court was impatient to reach the merits of the case throughout the proceedings. The Tribe, from the beginning, resisted the court's impulse to leap immediately to the fact-finding portion of the case. In its haste, the court brushed aside the Federal Rules of Civil Procedure and fundamental notions of fairness.

After the district court denied the State's initial motion to dismiss, App. 31, the issue of leaping ahead to the fact-finding phase came up at the pretrial conference

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[4] Astonishingly, the appeals court brazenly stated that the Indians' understanding of the critical 1848 Treaty was "*irrelevant.*" App. 23 (emphasis added).

portion of the hearing held on March 22, 1996, when the State indicated a desire to serve contention interrogatories, as the court had suggested in its opinion on the motion. App. 54. The Tribe resisted this as premature. Nonetheless, the district court brushed this aside, stating: "It's time to put some evidence on the record."[5] This statement sums up the court's procedural error in this case. The court proceeded to give the Tribe 30 days in which to answer the State's contention interrogatories – April 22, 1996. It also set a deadline for disclosure of the Tribe's experts (and hence the filing of their expert reports) of August 1, 1996, more than three months after the Tribe was ordered to respond to the State's contention interrogatories.[6]

The Tribe timely filed answers to the interrogatories, but noted in a general objection that the interrogatories were premature and disruptive of the discovery process because they conflicted with the rules governing expert reports.[7] The answers included 25 pages of factual

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[5] *Transcript of Motion Hearing and Pretrial Conference Held Before the Honorable Barbara B. Crabb* at 75 (Mar. 22, 1996).

[6] *Id.* at 76. Upon stipulation of the parties, the pretrial conference order was amended by order of the court on July 19, 1996. It extended the deadline for the Tribe's expert reports by one month, to September 3, 1996, and the State's deadline by two months. Other deadlines were adjusted accordingly. *Order Approving Stipulation re: Amending Preliminary Pretrial Conference Order* (July 19, 1996).

[7] *Plaintiff Menominee Indian Tribe of Wisconsin's Answers to Defendants' First Set of Interrogatories and Request for Production of Documents, Contention Interrogatories, Under the Court's Decision of February 26, 1996, and Relating to Judicial Estoppel* at 2-3 (Apr. 22, 1996).

narrative on the merits, a short preliminary expert report, and 22 pages produced in response to an accompanying request for production.

Upon receipt of the Tribe's answers to the interrogatories, the State filed a renewed motion to reconsider its original Rule 12(b)(6) motion to dismiss. In response, the Tribe objected to the procedural impropriety of the renewed motion and urged the court to deny the motion without considering the discovery materials or to explicitly convert the motion to one for summary judgment and give the parties an opportunity to respond accordingly.[8]

On September 16, 1996, the court issued its decision on the renewed motion to dismiss. In the guise of granting a motion for judgment on the pleadings, the district court in fact conducted something akin to an "in camera trial" by selective document while ignoring the Tribe's voluminous experts' reports, filed two weeks prior to the court's dismissal, and the hundreds of historical documents upon which the reports were based. In fact, the court did not even acknowledge the existence of the Tribe's experts' reports.[9] App. 96.

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[8] *Menominee Indian Tribe of Wisconsin's Brief in Response to Defendants' Renewed Motion to Reconsider or, in the Alternative, to Amend to Allow for Interlocutory Appeal* at 3-4 (June 25, 1996).

[9] The Tribe subsequently filed its *Memorandum Brief in Support of Motion to Alter or Amend Judgment* (Sept. 27, 1996), which was denied by the court as well. In its November 15, 1996 opinion, the court did acknowledge that the six expert reports were filed by the Tribe. However, except for the fleeting reference to the Lund Report, the contents of the reports were never discussed. App. 148.

The Tribe's objection to proceeding with discovery before the experts' reports were filed was well-founded. Contention interrogatories "are more appropriate after a substantial amount of discovery has been conducted." *Nestle Foods Corp. v. Aetna Casualty & Sr. Co.*, 135 F.R.D. 101, 111 (D. N.J. 1990). Placing the contention interrogatories as the first order of business was therefore wrong, and the Tribe was correct in objecting to them as premature.

The objection that the interrogatories usurped and disrupted the expert report process was also well-grounded. The district court assumed that the contention interrogatories were directed to identifying the Tribe's theory of the case. App. at 98, 107. The interrogatories asked: "Upon what [facts] will plaintiff rely [to establish] [to prove] [to support the assertion that] [to show]. . . ."[10] Since the interrogatories were aimed solely at the evidence, and not the theories or legal contentions, in the context of this case they requested disclosure of the substance of the Tribe's expert reports.

This type of inquiry is what the 1993 amendments to the discovery rules were designed to prevent. The new rule explicitly prohibits taking an expert's deposition before the expert's report has been filed. FED. R. CIV. P. 26(b)(4)(A). This provision was inserted because such discovery in advance of the report is premature, inefficient, and prejudicial. *See* FED. R. CIV. P. 26 Advisory

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[10] *Defendants' First Set of Interrogatories and Requests for Production of Documents, Contention Interrogatories, Under the Court's Decision of February 26, 1996, and Relating to Judicial Estoppel*, Interrogatory Nos. 1-9 (undated).

Committee Notes to 1993 Amendments, 146 F.R.D. 401, 638-39 (1993). While the rule by its terms does not prohibit factual contention interrogatories, the same rationale applies where as here the interrogatories in effect seek disclosure of the information in the expert reports. The court, then, should have postponed response to the premature interrogatories until after the expert reports had been filed, as the Tribe urged.

The district court's error on the interrogatories response was then enormously compounded when it relied upon those responses to dismiss the case in the guise of a judgment on the pleadings. The court's duty was plain: "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." FED. R. CIV. P. 12(c). *See also Venture Associates Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993).

Inexplicably, the district court was impatient with the Tribe and hostile to its claims. As *Mille Lacs* confirms, however, there is no doubt that the district court should have allowed the case to proceed through the submission of the Tribe's experts' reports, disclosure and submission of the State's experts' reports, if any, and discovery, to trial.

III. CONCLUSION

Based on the reasons set forth in the Tribe's petition and the arguments set forth above, the Court should either: (1) grant the petition and summarily reverse the court of appeals' decision in light of the *Mille Lacs* opinion; or, in the alternative, (2) remand to the court of

appeals to reconsider its ruling in light of *Mille Lacs*. The Tribe is entitled, now more than ever, to the opportunity accorded all other Indian tribes in similar litigation – to make its record regarding the meaning of these treaties. Only then will the district court be able to properly reach any conclusions regarding the Tribe's use rights.

Respectfully submitted,

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